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[illegible] COURT OF THE UNITED STATES

NUMBER 310

[illegible] ELECTRIC AND GAS COMPANY, A COR[illegible], Petitioner,

v.

[illegible] L. MATTSON, ADMINISTRATOR OF THE [illegible] OF WILLIAM BREHM, DECEASED, AND [illegible] SCHOOL DISTRICT OF THE CITY OF LE[illegible], Respondents.

[illegible] FOR WRIT OF CERTIORARI TO THE [illegible] STATES COURT OF APPEALS FOR [illegible] EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

[illegible]

[illegible] for Petitioner.

[illegible] PUBLISHING CO., Law Book Makers, Chicago, Ill.

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In The

SUPREME COURT OF THE UNITED STATES

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NUMBER ———

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CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

———::———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

———::———

MAX KIER,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Central Electric and Gas Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, in the above cause designated in said court as Number 13705 Civil, wherein this petitioner was appellee and the respondent, C. Russell Mattson, Administrator of the Estate of William Brehm, deceased, appellant.

Said judgment was entered on the 11th day of April, 1949. The opinion of the court below is not yet reported, but is found on page 172 of the Transcript of Record in this cause, certified to on the 3rd day of June, 1949, by E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, submitted herewith.

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254, and Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States.

The matter involved in this cause, is that the respondent, a resident of the State of Nebraska, seeks damages against the petitioner, a Delaware corporation engaged in the business of supplying and distributing natural gas in the City of Lincoln, for the death of William Brehm as the result of an explosion occurring in the basement of the premises occupied by the Capitol School of the City of Lincoln, Lancaster

County, Nebraska, on December 19, 1945 (R2). The decedent was an employee of the School District of the City of Lincoln as custodian of the said Capitol School building (R37). The School District of the City of Lincoln owned a gas service line running from the curb line of the premises of the Capitol School for a distance of approximately 150 feet in a northwesterly direction, where it entered into the basement of the school building (R81, 126, 128, 129, 130. 131, 142, 149). The gas service line consisted of 1¼ inch cast iron pipe, buried under approximately four feet of earth, covered by a cement driveway, which in turn was covered with approximately seven inches of ice and snow (R44,45,92,101,118,121). Excavation made shortly after the accident revealed a section of the pipe, at a place where the pipe turned and approached the basement of the school building, to be deteriorated and porous (R70, 72). The respondent complained generally that this petitioner gas company was negligent in failing to inspect said gas service line and allowing the pipe to become deteriorated and unable to confine gas. No notice to the petitioner gas company was made of any escape of gas upon the premises of said school building, nor did the petitioner or its employees possess a knowledge of the condition of the service line which is complained of (R156). The trial judge directed a verdict for the petitioner, defendant, finding that the law of the State of Nebraska, which concededly controlled, fails to impose any obligation of inspection, supervision, or maintenance of a privately owned service line upon private premises, upon a supplier of gas in the absence of notice or knowledge of the escape of gas therefrom

imparted to it (R155,156). The United States Court of Appeals for the Eighth Circuit, one judge dissenting, reversed the United States District Court for the District of Nebraska, and remanded said cause for retrial, the court finding that dicta of the Supreme Court of the State of Nebraska supported the conclusion that the local law imposes the duty of inspection and maintenance of service lines upon private premises upon the utility company, and that the local law would allow a jury to find negligence of the petitioner from a mere showing that the service pipe in question had been in use for any considerable time (R178).

The questions presented by this petition for writ of certiorari are:

1. May the United States Courts, in an effort to determine and ascertain the controlling local law, take for guidance dicta and irrelevant expressions of the local court upon wholly dissimilar factual inquiries?

2. Has the Court of Appeals properly ascertained the law of the State of Nebraska with respect to the duties of suppliers of natural gas with reference to the inspection and maintenance of gas service lines located upon the private premises of its consumers?

3. Has the United States Court of Appeals properly ascertained the law of the State of Nebraska with respect to the imparting to suppliers of gas of constructive notice of the existence of latent defects in private service lines?

4. Did the United States Court of Appeals give proper consideration to the ascertainment and determination of the laws of the State of Nebraska with reference to this cause as made by the United States District Court?

The reasons relied upon for the allowance of this writ are:

1. The United States Court of Appeals in this cause, failed to give proper consideration to the determinations of the United States District Court as to the state of Nebraska law.

2. The United States Court of Appeals improperly and erroneously determined important questions of local law which control this cause.

3. The United States Court of Appeals, in an effort to ascertain the law of the State of Nebraska, took for guidance dicta and irrelevant expressions of the Supreme Court of the State of Nebraska upon wholly dissimilar factual situations.

4. The United States Court of Appeals in this cause has improperly ascertained the law of the State of Nebraska with reference to the duties of inspection, maintenance, and supervision by gas suppliers of private gas service lines.

5. The United States Court of Appeals has wholly disregarded decisions of the Supreme Court of Nebraska which establish the Nebraska law to be that the existence of latent defects is not constructively imparted or implied.

6. The United States Court of Appeals, in ascertaining the law of the State of Nebraska, has given improper and incomplete consideration to *Clough* v. *North Central Gas Company*, 150 Neb. 418.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

MAX KIER,
Counsel for Petitioner.

In The

SUPREME COURT OF THE UNITED STATES

NUMBER ———

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

OPINION BELOW.

The opinion of the court below, not yet reported, is found on pages 172 to 185, inclusive, of the Transcript of the Record in this cause, certified to on the 3rd day of June, 1949, by E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, and which is submitted herewith. The judgment of said court and which is complained of, was entered on the 11th day of April, 1949.

JURISDICTION OF COURT.

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254, and Rule 38, Subsection 5(b) of the Revised Rules of the Supreme Court of the United States. Specifically, it is contended that the United States Court of Appeals for the Eighth Circuit, in the arriving at its judgment, followed a method and procedure in conflict with decisions of other courts of appeals for other circuits, and has decided important questions of local law in a way that is in conflict with applicable local decisions.

STATEMENT OF THE CASE.

A concise statement of the case follows. (Opinion United States Court of Appeals for the Eighth Circuit, Trans. pp. 172-189).

On December 19, 1945, William Brehm, an employee of the School District of the City of Lincoln, while engaged as a custodian or janitor in the Capitol School building in Lincoln, Nebraska, came to his death as the result of an explosion of natural gas which occurred in the basement of the Capitol School building (R2-3). Action was instituted by the administrator of the estate of said decedent against the defendant, a Delaware corporation, the supplier of natural gas to the Capitol School building on the date of decedent's death (R2). The action was removed to the District Court of the United States for Nebraska, Lincoln Division (R1). Upon trial of the case, the plaintiff showed that a section of the gas service line upon the premises of the School District, and which had been paid for by the School District and installed at the di-

rection of the School District, had become porous and deteriorated (70, 72, 128, 129, 130, 131). No. notice of any escape of gas was ever made to the petitioner Gas Company or any of its employees, and the company had no knowledge of the fact that the service pipe, or any portion thereof, would no longer contain and confine natural gas (R152). The gas line in question, at the time of the explosion, was buried in four feet of earth, covered by a cement driveway which was capped by a covering of snow and ice (44,45,92,101, 118,121). No showing of any method or procedure for inspection which would have disclosed the condition of the pipe was made. The pipe had been placed in the ground by petitioner's predecessors approximately 25 years previously, and there was some evidence that under certain conditions of the soil the effective, practical life of such lines is from 10 to 15 years, although serviceable gas pipes laid more than 40 years ago are found in this community (R123). Upon this evidence, the trial judge directed a verdict for the defendant, petitioner herein, and dismissed plaintiff's cause upon the basis that the law of the State of Nebraska does not impose a duty of maintenance or inspection of private pipes upon a supplier of natural gas in the absence of actual notice or knowledge to the gas supplier of defect in the pipe or of the escape of gas (R145-157). The Court of Appeals for the Eighth Circuit, upon appeal, one judge dissenting, reversed the judgment of dismissal entered by the trial court, and remanded this cause for trial for the asserted reasons that there is considered dicta in decisions of the Supreme Court of the State of Nebraska indicating (1) that it is the law of the State of Nebraska that gas companies have the duty of mainte-

nance and inspection of private appliances in the absence of actual notice of defect therein and (2) that a jury might properly charge a gas supplier with constructive notice of defective service lines from the mere length of time that such lines had been in existence, and that such constructive notice is just as effective as actual notice (R172-189).

SPECIFICATION OF ERRORS.

It is respectfully suggested that the Court of Appeals for the Eighth Circuit erred in the following respects.

1. In that the court followed dicta and other immaterial expressions of the Nebraska Supreme Court and based its judgment of reversal upon such chance expressions.

2. That the court failed to give proper consideration to the determinations of the trial judge of the United States District Court for the District of Nebraska, Lincoln Division, as to the state of the law of Nebraska.

3. In that the court erroneously determined that the law of the State of Nebraska imposes a duty of inspection and maintenance of private pipes upon the supplier of gas in the absence of notice or knowledge of the defective condition thereof.

4. In that the court of appeals erroneously determined the law of the State of Nebraska to be that a jury might charge the supplier of gas with constructive notice of the condition of private supply pipes.

ARGUMENT.

I.

Specifications of Error Number 1.

Concededly, the law governing and controlling the disposition of this cause, is the law of the State of Nebraska. In its attempt at ascertainment of Nebraska law, the Court of Appeals for the Eighth Circuit followed the rule peculiar to this circuit to the effect that the state of local law may be determined by reference to dicta in the decisions of the local court. The court of appeals made a practical obeisance to this rule by applying to the case at bar statements wrenched from *Harms* v. *City of Beatrice,* 142 Neb. 219, 5 N. W. (2d) 287, which statements were wholly irrelevant to a determination of the matter before the court, and which were made with reference to a wholly dissimilar factual situation from that of the case at bar. *Harms* v. *City of Beatrice,* supra, involved injury to a pedestrian on a public way who had tripped upon a water meter which was installed by the city in its proprietary capacity on the public way. The question of liability of a utility company with reference to a private installation upon private premises was not involved. In its treatment of the Harms case, the Supreme Court of Nebraska spoke cursorily of the duty of the city with reference to service pipes that are a part of the water system and remarked that the city could not escape the duty imposed upon it with reference to the water system by reason of the fact that its customer had paid for the installation of the service line. Such statements and comments were aside excursions, unnecessary and irrelevant to the disposition of the case be-

fore it. The court of appeals, in its review, seized upon the statements of the Nebraska Supreme Court previously adverted to, and made such statements the basis for its judgment of reversal. It will be noted in a later division of this brief, that other statements and decisions of the Supreme Court of the State of Nebraska pointedly and definitely define the duty of gas companies with respect to private service lines in a manner contradictory to the dicta of the Harms case. What we are concerned with in this division, and by this specification of error, is the right of the federal court to premise its determination of the local law upon mere dicta and irrelevant expressions—statements that would not be treated as authoritative by the state court itself.

State v. *Marsh,* 107 Neb. 637, 187 N. W. 87.
City of Lincoln v. *Steffensmeyer,* 134 Neb. 613, 279 N. W. 272.
Yoder v. *Nu-Enamel Corp.,* 140 Neb. 585, 300 N. W. 840.

We submit that the Court of Appeals for the Eighth Circuit, in so determining the local law from dicta of the Nebraska court was following a rule contradictory to the rule of other circuits and contrary to better principle and reason.

The Second Circuit, in *New England Mutual Life* v. *Mitchell,* 118 Fed. (2d) 414, has clearly assumed the position that the determination of local law is not to be made from mere obiter and chance expression. The Sixth Circuit likewise has announced the rule that in the absence of a controlling decision by the highest court of the state, the federal court must, for itself, de-

termine the law with reference to the situation presented. *Phil. Nat'l Bank* v. *Ruff*, 76 Fed. (2d) 843. Other similar holdings are *Buder* v. *New York Trust Co.*, 107 Fed. (2d) 705; *Van Denbark* v. *Owens Illinois Glass Co.*, 110 Fed. (2d) 310; *C. R. Jennings* v. *Maestri*, 97 Fed. (2d) 679; *In Re Phoenix Hotel Co.*, 83 Fed. (2d) 724. The rule adopted and followed by the Court of Appeals for the Eighth Circuit, we submit to be contrary to the rule of this court as announced in *Carroll* v. *Carroll*, 16 How. (U. S.) 1275.

We concede that in its determination of local law, the federal courts are privileged, and indeed should, consider all available data in order to arrive at a proper conclusion. Such weighing of the available data does not justify the federal court in disregarding the sound and reasonable rule arising out of the common law of the state. The function of the federal court would seem to involve something more than a mere finding of judicial expression by the local court which can be tortured into some application to the immediate situation. The duty of the federal court would appear to be to make a reasoned and weighted determination of the local law. The court of appeals in the case at bar made no effort to assay the soundness or quality of the chance expressions found by it, but is content merely to observe that such expressions offer a possible basis for a submission of this cause to a jury. As so followed and applied, the considered dicta rule of the Court of Appeals of the Eighth Circuit is contrary to decisions of the other circuits and contrary to sound public policy.

II.

Specification of Error Number 2.

The court of appeals, in its review of this cause, based its conclusion upon a search and determination of the local law made entirely independently of and uninfluenced by, the research, knowledge, and considerations of the learned trial judge. Such independent ascertainment was made because the court of appeals believed that the trial judge "did neither purport to follow, or be influenced by, any adjudication of the Supreme Court of Nebraska" (R181). By reason of this observation, the court of appeals deprived itself of the extensive, learned, and thorough analysis of the local law made by the trial judge, who himself had been a practitioner at the bar of the State of Nebraska for many years and who had thereby a special competence to determine the legal issues presented by this controversy.

The oral opinion delivered by the trial judge, and the written opinion entered by the trial judge on respondent's motion for new trial made in the district court, made full reference and extensive inquiry into all of the Nebraska decisions advanced by counsel, and which could be said to have a bearing upon this case (R15, 145). Thus, the trial judge observed, with reference to *Harms* v. *City of Beatrice,* 142 Neb. 219:

> "I consider that this case is entirely out of point with the present action," (R153)
>
> "cannot, without judicial extension and distortion, estimate any view of the Nebraska Court upon a question of the matter before the court" (R18).

The trial judge noted that the general law is to the effect:

> "That in the absence of notice of a leaky or otherwise defective condition thereof, a company supplying gas is not under a duty to keep in repair or inspect pipes or appliances on private property" (R151).

The trial judge observed that *Fonda* v. *Northwestern Public Service Co.*, 134 Neb. 430, and 138 Neb. 262, was entirely consistent with the general law, and indeed, was a recognition of the general rule (R17). The trial judge therefore concluded that the general and common law applied in Nebraska and that the facts would not make out a case from which legal liability could be imposed (R18, 19).

This court has explicitly held that the findings as to the local law, made by the trial judge, are entitled to great consideration. In *Texarkana* v. *Arkansas-Louisiana Gas Co.*, 306 U. S. 188, 83 L. Ed. 598, this court said:

> "This court looks to the trial court for the original examination of local questions and relies for aid upon the explanation of its conclusion."

Again, in *Huddleston* v. *R. H. Dwyer,* 322 U. S. 232, 88 L. ed. 1646, this court stated:

> "When the Supreme Court is called upon to decide questions of state and local law, the expressions of the views of the judges of these courts who are familiar with the intricacies and trends of local law and practice, if not indispensible, is at least a highly desirable and important aid to our determination of state law questions."

It may be observed that one member of the court of appeals upon his independent analysis of the law of the State of Nebraska found:

> "Careful examination of the Nebraska decisions as of the time of the trial of this case, convinces me that the trial judge was correct in this statement" (R186).

The contrary determination made by two judges of the court of appeals was entirely uninfluenced by the findings of the trial court. In this, the court of appeals failed to follow its own decisions (*Russell* v. *Turner*, 148 Fed. (2d) 562; *Abbott* v. *Arkansas Utilities Co.*, 165 Fed. (2d) 339). At the very least, this contrariety of legal findings among the various judges who have made inquiry and investigation into the local law warrants a reinquiry and redetermination of those issues. (*Cities Service Co.* v. *Dunlop*, 308 U. S. 208, 84 L. ed. 196).

III.

Specification of Error Number 3.

It is concededly the general rule that suppliers of natural gas have no duty of inspection or maintenance of private pipes or appliances in the absence of duty having been undertaken, or actual notice of knowledge of the defective condition thereof (28 C. J. 735, Title Gas, Section 59 (d); 24 Am. Jur. Title, Gas, paragraph 32 page 686; 138 A. L. R. 883; Shearman and Redfield, Negligence, Volume 4, Section 766, page 1754). The court of appeals in reviewing this cause, came to the conclusion, one judge dissenting, that there were declarations by the

Supreme Court of the State of Nebraska, making "it clear that the service pipe was a part of the Gas Company's system," and that, though such instrumentalities may be the property of the consumer, that the gas supplier has a continuing duty of inspection and maintenance thereof (R180). In this connection, it is contended that the court of appeals has misinterpreted and misapplied Nebraska cases and has made an erroneous determination of the Nebraska law, and that, therefore, the petition for writ of certiorari is properly asserted (*Rorick* v. *Devon Syndicate,* 307 U. S. 299, 83 L. ed. 1303).

The majority opinion of the court of appeals, in concluding that the Nebraska law is different and contrary to the rule almost universally prevailing in other states is predicated almost entirely upon certain statements made by the Supreme Court of Nebraska in *Harms* v. *City of Beatrice,* supra. As has previously been observed, the cause of injury in the Harms case was a defective water box installed on a public way. There was, therefore, no occasion for the court to consider the liability of the city as a supplier for private installations made upon the customer's property, nor did the Nebraska court attempt to deal with that different situation. The Supreme Court of Nebraska, however, considered the components making up a water works system and stated, "the operation of a water works system, requires not only a pumping plant and a series of water mains, but it requires service lines to the property of the consumer as well." The Supreme Court of Nebraska followed this observation with the statement:

"The fact that the consumer may be required to pay the cost of labor and materials in the installation of the service lines, does not seem to us to be controlling."

From these statements of the Supreme Court of Nebraska, the court of appeals, two judges deciding for the court, concluded that the service line in the case at bar was a part of the Gas Company's system, and under which the petitioner was charged with a continuous duty (R182).

Even in the absence of other decisions and more specific declarations by the Supreme Court of Nebraska, it is evident that the Harms case does not warrant the conclusion arrived at by the two judges of the court of appeals. It should be evident (1) that the Harms case did not consider, has no bearing upon, and that there was no contemplation by the Supreme Court of Nebraska of the situation where private installations have been made upon the private property of the consumer; (2) the declarations of the Supreme Court of Nebraska were with reference to service pipes "to the property of the consumer." In other words, the side remark of the Nebraska court was with reference to company's lines brought to the property of the customer, and the Nebraska court was not considering, did not have before it, and cannot be assumed to be dealing with pipes of the supplier's consumer and on the consumer's property. The manifest error of the court of appeals lay in the indiscriminate use of the term "service pipes." A service pipe might consist of lines of the company laid to the property of the customer, it may also consist of lines of

the customer laid upon the property of the customer. The remarks by the Supreme Court of Nebraska referring to "service pipes" cannot be taken out of their context and out of the setting before the court, and considered to be a declaration of that court with respect to pipes of whatever nature and installation and wherever found, and particularly so when the Supreme Court of Nebraska qualified its observations by reference to pipes "to the property of the consumer."

When considered in the light of other decisions of the Supreme Court of Nebraska, it becomes clear that the court of appeals was entirely erroneous in its determinations. Thus, the court of appeals failed to note the statements of the Supreme Court of Nebraska in *Fonda* v. *Northwestern Public Service Co.*, 134 Neb. 538, in which the defendant service company had improperly installed and thereafter failed to repair a conversion burner after its attention had been directed to a defect therein. The Supreme Court of Nebraska said:

> "Having undertaken this inspection, it was the duty of the appellees to exercise ordinary care in making such inspection and to make any reasonable repairs * * *. The company is not required to keep up a consistent inspection, but when its attention is called to the trouble, and it undertakes to remedy it, then this inspection, where there may be great danger, should be thorough and efficient."

The Fonda case was again before the Supreme Court of Nebraska in 138 Neb. 262, and that court again held:

> "Having undertaken this inspection, it was the duty of the employee to exercise ordinary care in

making such inspection and to effect any necessary repair."

The Fonda case thus admits of the clear implication that as to private pipes or appliances, and in the absence of defect in the original installation, and in the absence of notice or inspection having been undertaken and assumed, that no duty of inspection, repair, or maintenance, is imposed upon the utility company. The clear implications of the Fonda case are pointed up in *Clough* v. *North Central Gas Co.*, 150 Neb. 418, 34 N. W. (2d) 862. This case was an action to recover damages sustained in a gas explosion caused by a leak in the customer's service line. The Supreme Court of Nebraska had before it, therefore, a determination of the exact question necessary for determination in the case at bar, namely, what is the duty of the gas supplier with respect to service pipes upon the property of its consumer, and which lines belong to the consumer? The answer to this question is stated in the syllabus prepared by the court:

"A legal duty of a gas company as to third persons in reference to the escape of gas from service lines owned and controlled by others on private property, and leading from the company's pipes in the street to its meter in the consumer's building, the pipes having been properly installed and tested, determined to be safe for use, and actually safely used for some time, does not extend to thereafter making inspections of said service pipes, unless the company has knowledge of a probable defective condition in such pipes, or has knowledge of circumstances rendering it probable that gas is escaping therefrom, or unless the company is bound by contract, franchise, or custom, to make such inspection."

In the particular case, evidence was adduced to the effect that complaint had been made to the manager of the gas company, that gas was escaping in the building, and that the gas company has thereby received notice that there were defects, permitting the escape of gas. The conclusion of the Supreme Court of Nebraska, therefore, was:

> "Thus, where it appears that a gas company has knowledge that gas is escaping in a building occupied by one of its consumers, it becomes the duty of the gas company to shut off the gas supply until the necessary repairs have been made, although the defective pipe apparently does not belong to the company and is not in its charge or custody * * * . We believe the record discloses evidence sufficient from which the jury could find that the gas company had notice of the defective condition existent, and as it did have such notice, it becomes a question for the jury whether or not it made proper inspection and repairs with reference thereto."

The Nebraska court, in the course of its opinion, referred to *Stephany* v. *Equitable Gas Co.*, 347 Pa. 110, 31 Atl. (2d) 523; *Windish* v. *Peoples Natural Gas Co.*, 248 Pa. 236, 93 Atl. 1003; *Wilson* v. *East Ohio Gas Co.*, 68 Ohio App. 490, 42 N. E. (2d) 180, and to the annotation appearing in Volume 138 A. L. R., page 883. All of these citations refer to jurisdictions which have enunciated and follow the general rule to the effect that the responsibility of the gas company arises from knowledge of a dangerous condition and not by reason merely of the existence of the condition. The Clough case plainly is an expression of the general rule, and its clear effect is to place Nebraska among the

great majority of American jurisdictions which do not impose liability upon a supplier of gas with respect to installations upon the property of its consumers in the absence of actual notice of the defect in such installation or of the fact that gas is escaping therefrom. The contrary conclusion of the court of appeals is not in consonance with the Nebraska decision, is not supported by a proper analysis of the Nebraska decisions, and is a wholly erroneous determination of the Nebraska law.

IV.

Specification of Error Number 4.

The court of appeals, in part, predicated its conclusion upon the basis:

> "While the defendant did not have actual notice that gas was escaping from this perforated pipe, it did know that gas would escape from a perforated pipe, and it was charged with knowledge, at least the jury might have so found, that the pipe had probably become perforated. * * * Under the circumstances disclosed by the record, the jury might properly have charged the company with constructive notice, and if so, that notice is just as effective as actual notice" (R178).

The pipe in question had been laid some four feet underground, was covered by a cement driveway, which at the time of the explosion was also covered by approximately seven inches of ice and snow (R70, 72). No method or procedure for finding the actual condition of the pipe, short of excavation thereof, was disclosed, or has ever been asserted. The effect of the opinion of the court of appeals is, therefore, that

a gas company is charged with constructive notice of the condition of service lines, from the fact alone that the company was aware that such lines had been safely used for some considerable time. The foregoing statement of the law is not a proper or accurate reflection of the law of the State of Nebraska, and the court of appeals was thereby in grevious error.

First, the state law of the State of Nebraska, as it is indeed the general law, is that the placing of one upon notice is not the equivalent of knowledge, but merely imposes a duty of inquiry and charges such person with what might have been learned through the exercise of reasonable inquiry. (39 Am. Jur., Section 13, page 241; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 40; *Hollenbeck* v. *Guardian National Life Insurance Co.*, 144 Neb. 684, 14 N. W. (2d) 330). Thus, in this particular case, if this petitioner was placed upon inquiry, it became chargeable with such knowledge of the condition of the pipe that it would have learned upon reasonable investigation and in the exercise of reasonable diligence. The escape of gas had not been discerned by any person on or about the premises of the Capitol School building. Nor is it suggested by anything that appeared in the evidence or record of this cause that any method of inspection or detection existed which would have revealed to the petitioner the true condition of the pipe. The opinion of the court of appeals in this respect is therefore incomplete, inconclusive, and would allow a jury to fix liability upon hypothesis, surmise, and conjecture. Secondly, it is clearly demonstrable, that it is the law of the State of Nebraska that knowledge, which is the basis of liability for negligence means actual knowl-

edge and not such knowledge as may be constructively implied. The court of appeals failed to note and consider the following cases which establish that the doctrine of implied notice does not apply in Nebraska so as to charge one with the existence of knowledge of latent defects.

Gates v. *City of North Platte,* 126 Neb. 785, 254 N. W. 418, in which the plaintiff sued for injuries received as the result of stepping upon a manhole cover which the city had placed over a water meter box located on the parkway immediately adjacent to the sidewalk. The cover broke under the plaintiff's weight. No claim was made that the cover had been improperly constructed or improperly installed, but that it had lost its strength so that it was no longer able to sustain weight, and had become deteriorated through natural processes of wear and tear. The Supreme Court of Nebraska determined that no liability could be imposed upon the city, saying:

> "In the absence of actual notice, it is not ordinarily liable for failure to discover the existence of a defect in a manhole cover which had been properly constructed, regularly inspected and apparently safe and secure * * *the injury sustained according to the evidence was not caused by any direct or positive act of the city or its servants, nor was it the result of negligence in original construction; but so far as we are advised by the record, it was the result of natural conditions * * * there is no evidence that the city had express notice of any defect * * * the ground of recovery against the city here is an act of commission or omission and it is necessary for the plaintiff to prove negligence on the part of the city. Negligence is an inference to be deduced from pri-

mary facts. It is not enough that an accident has happened, but it must be shown that the municipality was in fact guilty of negligence."

City of Omaha v. *Kochem*, 74 Neb. 718, 105 N. W. 182, in which it was sought to charge the city with liability for injuries to a pedestrian who had been injured by reason of a defect in a cover over a coal hole. The particular cover was apparently safe but bolts underneath which had been used to secure the cover had become broken and ineffective. The Supreme Court of Nebraska held that there could be no liability imposed upon the city under such facts, saying:

> "A city charged with the duty of keeping its streets and sidewalks in safe condition for use is not required to search for defects therein, where there is no reason to suppose defects may be found.
>
> "The city of Omaha must use ordinary care and diligence to keep its streets and sidewalks in reasonably safe condition for use by the public, but it will not be charged with implied notice of a latent defect in a sidewalk, not apparent on ordinary inspection, until such time or the happening of such event as will challenge the attention of a man of ordinary diligence charged with a like duty to such effect."

Struble v. *Village of Dewitt*, 81 Neb. 504, 116 N. W. 154, the Supreme Court of Nebraska again declared:

> "A city or village is not required to have its sidewalks so constructed and kept in repair as to secure absolute immunity to persons using them, nor is it bound to employ the utmost care and exertion to that end. Its duty is only to keep the sidewalks in reasonable safe condition for the use of persons passing over them."

The court noted with approval the rule previously stated in *City of Lincoln* v. *Pirner,* 59 Neb. 634, 81 N. W. 846:

> "A city in the absence of actual notice is not ordinarily liable for failing to discover the existence of a defect in a scuttle hole which had been properly constructed and was apparently safe and secure."

Hashberger v. *City of Schuyler,* 115 Neb. 639, in which the plaintiff was injured by a defective manhole cover which the city had caused to be placed on a public way between a sidewalk and a public fountain. The cover, as in the previous cases noted, was apparently safe but had deteriorated through natural processes which were not apparent upon visible inspection. The Supreme Court of Nebraska held that there could be no liability under such circumstances.

> "Since the defendant had no knowledge of such fact, and it is not shown that whoever moved the cover did so at the direction or by permission of any city official or employee, it cannot be said that any negligence has been shown that could render the defendant liable."

In *Knies* v. *Lang,* 116 Neb. 387, a situation was before the Supreme Court of Nebraska in which the plaintiff was injured when a high wind caused a board to be loosened and blown from a building owned by the defendant. The building had been constructed some 35 years previously. No complaint was made as to the original construction of the building, but that nails on the inner side of the board had become rusted and that thereby the board was not securely fastened, and was subject to being torn from the building. The Su-

preme Court of Nebraska, in its determination of that case, held specifically:

> "Latent defects which are concealed and an incident to ordinary wear and tear and so developed as to render discovery impossible, in the exercise of ordinary care, are casualties which no man can avoid without the exercise of extraordinary care and diligence which the law does not impose."

The court of appeals in its review of this cause, was in error in finding that the petitioner had an opportunity, by the exercise of reasonable diligence, to discover the true condition of the pipe. The court of appeals, in its review of this cause, was in error in determining that under the law of the State of Nebraska the petitioner could be charged with knowledge of the true condition of the service pipe in the absence of the showing by the respondent of the existence of tests, methods, and procedures which would have apprized the petitioner of the true condition of the pipe had such methods been utilized. The court of appeals, in its review of this cause, was in error in charging this petitioner with implied or constructive notice of latent defects in the service pipe, when such doctrine of implied notice has been clearly negatived by the Supreme Court of Nebraska. The court of appeals, in its review of this cause, has therefore erroneously determined propositions of law decisive of the issues involved in a manner inconsistent with, and in violation of, the law of the State of Nebraska as established and ascertained by the Supreme Court of the State of Nebraska. The petition for writ of certiorari should be granted so that a proper ascertainment and determination of important questions of local law may be made, and that this cause

may be determined in a manner consistent with the common law of the State of Nebraska and the opinions and decisions of the highest court of the State of Nebraska.

Respectfully submitted,

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